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VIA EMAIL

Lael Echo-Hawk
Counselor to the Chair
National Indian Gaming Commission
1441 L Street, Suite 9100
Washington, DC 20005

Re: Comments on Notice of Inquiry and Request for Information

Dear Ms. Echo-Hawk:

On behalf of the Lytton Rancheria of California (Tribe), we hereby submit the following comments in response to the National Indian Gaming Commission's (Commission) Notice of Inquiry and Request for Information. The Tribe would like to thank the Commission for the opportunity to submit comments on the Commission's regulatory framework for implementing the Indian Gaming Regulatory Act ("IGRA"). The Tribe supports the Commission's efforts to seek tribal input regarding which regulations need revision and the process by which such regulations should be revised.

PART 502 - DEFINITIONS

502.15 – Management Contracts

Should the definition be expanded to include any contract that pays a fee based on a percentage of gaming revenue?

The IGRA provides the Chairwoman with authority to approve a management contract for the operation and *management* of a Class II and Class III gaming activity. Consistent with the statute, the regulations define a "management contract" as a contract which provides for "the *management* of part or all of a gaming operation."

As a legal matter, the Commission does not have the authority to expand the regulatory definition of the term "management contract" to include contracts which do not provide for the "management" of some or all of a gaming operation. Therefore, the Commission does not have authority to expand the definition of the term "management contract" to include any contract, such as a slot lease agreement, which pays a fee based on a percentage of gaming revenues.

Should there be a definition regarding acceptable compensation to a manager contractor?

The Commission does not have the authority to approve development, loan, marketing, non-gaming management and other agreements which do not provide for the "management" of a gaming operation. Since the Commission does not have authority to approve such agreements in general, it does not have the authority to approve the reimbursement and/or compensation components of such agreements, in particular. Therefore, the Commission should not attempt to expand its role by adopting a new definition for "acceptable compensation" or other regulations in order to regulate the compensation paid to management contractors in agreements which do not constitute management contracts requiring approval of the Chairwoman.

The body of Commission and court opinions relating to what constitutes a "management contract" is extensive and reasonably clear. The Commission should not endeavor to muddy those waters, and thereby unsettle the marketplace, by attempting to indirectly regulate compensation paid by tribes to contractors under agreements which do not constitute management contracts.

502.16 – Net Revenues

Should the Commission's definition of Net Revenue be revised to be consistent with GAAP?

The IGRA specifically defines the term "net revenues." In 1992, the Commission adopted regulations defining "net revenues" in a manner which faithfully tracked the statutory definition. In 2008, the Commission revised the regulatory definition of "net revenues" in a manner which does not faithfully track the statutory definition and which is internally inconsistent. In the 2010 Notice of Inquiry, the Commission raises the question as to whether it should adopt two new regulatory definitions of "net revenues," each of which is inconsistent with the statute, inconsistent with the 2008 regulatory definition, and inconsistent with each other.

The Commission should only adopt regulations which are consistent with the statute, especially when there is clear statutory guidance. Therefore, if the Commission elects to revise the regulations regarding the definition of "net revenues," it should conform the regulatory definition to the statutory definition. In any event, the Commission should not attempt to exceed its statutory authority by creating new definitions of "net revenues" which are inconsistent with the statute.

Should the Commission consider adding a new definition for Net Revenues-allowable uses that is based on cash flow?

There is no statutory authority which permits the Commission to expand the IGRA's definitions. Thus, it is inappropriate for the Commission to arbitrarily create a new definition. In addition, the existing Bulletin (05-1) defining Net Revenues should be withdrawn as it is overreaching and outside the Commission's authority.

If the Commission should nevertheless decide to add such a definition, it should do so in consultation with tribes to ensure that such definition does not adversely impact the ability of tribes to provide for the general welfare of their members or engage in economic development or charitable activities.

PART 514 - FEES

Should the Commission consider amending this part to define gross gaming revenue consistent with GAAP?

The term Gross Gaming Revenues is specifically defined by the IGRA for the purposes of calculating the Commission's fees. The current regulations clarify the meaning of "gross revenues" in a manner consistent with the statute and add that "[u]nless otherwise provided by the regulations, generally accepted accounting principles shall be used."

Therefore, if the Commission's question is whether to amend the regulatory definition of "gross revenues" in a manner which is inconsistent with the statute, the Commission does not have the authority to do so in light of the statutory definition. If the Commission's question is whether to use generally accepted accounting principles in calculating "gross revenues" to the extent those principles are not inconsistent with the statutory definition of "gross revenues," it would appear that the regulations already accomplish that purpose.

Should the Commission consider amending this Part to include fingerprint process fees? If so, how should the Commission consider including fingerprint processing fees?

If the intent is to pay fingerprint fees as an annual fee, where a billing would be made once a year either by the Commission or the operation and paid in addition to the annual fee, then the Commission should not amend 514 to include fingerprint process fees. If, however, the intent is to increase the Commission's annual fee by a small percentage and eliminate the need to pay fingerprint fees at all, then Part 514 should be amended to include fingerprint process fees.

Should the Commission include a requirement for it to review fingerprint processing costs on an annual basis and, if necessary, adjust the fingerprint processing fee accordingly?

The Commission should review and adjust fingerprint processing costs on an annual basis. In addition, it would be a good practice for the Commission to publish all charges as far in advance as possible. This would facilitate budgeting by Tribes and provide adequate time for comments. The Commission should consider utilizing a bulletin to set out the process and fees rather than a regulation; this would enable the Commission to more easily update and revise the process and fees as needed.

Should the Commission consider a late payment system in lieu of a Notice of Violation (NOV) for submitting fees late?

If the intent is to reduce the severity of the Commission's current practice regarding late payments, then the Commission should implement a late payment system. A Notice of Violation (NOV) should be used only after the Commission has exhausted other avenues. However, the Commission should be careful that any change does not result in a more aggressive system. Thus, it is imperative that the

Commission work closely with tribes to develop a payment system that is comprehensive, clear, and provides appropriate due process.

Should the Commission consider adding a type of "ticket" system to Part 514 so that an NOV would only be issued in instances of gross negligence or wanton behavior, or in a dollar amount that allowed the Tribe to reap an economic benefit from its failure to pay in a timely manner?

See above comment.

PART 518 – SELF REGULATION OF CLASS II

Currently, Part 518 is inconsistent with the IGRA. Self-regulation is a hallmark of tribal sovereignty and should be supported and encouraged by Part 518. The Commission should revise Part 518 to ensure (i) that it is consistent with the IGRA; (ii) the steps to achieve self-regulation are clear; (iii) that the regulations are not punitive.

PART 531 – COLLATERAL AGREEMENTS

Should the Commission consider whether it has authority to approve collateral agreements to a management contract?

The Commission's past practice has been to require that, at the time a tribe submits a management contract to the Commission for approval, the tribe also submit all collateral agreements to the management contract. At the same time, the Commission's position has been that the only agreement which requires the Chairwoman's approval is the management contract and that collateral agreements are not void under the IGRA due to lack of approval by the Chairwoman.

The Commission's past practice and positions with regard to these matters have been the correct approach. The Commission should not seek to alter its previous positions by now adopting a new position that collateral agreements also require approval of the Chairwoman, even in circumstances in which the management contractor may be receiving substantial compensation pursuant to such collateral agreements. If the Commission were to change its position on this issue more than 20 years after the IGRA has been enacted, the change could generate unhelpful, uncertainty in the marketplace regarding the effectiveness of previously executed collateral agreements and future collateral agreements. Such an outcome would likely have a negative impact on tribes.

PART 533 – APPROVAL OF MANAGEMENT CONTRACTS

Should this Part be revised to clarify the trustee standard by adding the following two grounds for possible disapproval: The management contract was not submitted in accordance with the submission requirements of 25 CFR Part 533 or the management contract does not contain the regulatory requirements for approval pursuant to 25 CFR Part 531?

It is unnecessary for the Commission to add to the grounds specified in the IGRA and the regulations for disapproving a management contract. If the Commission feels the management

contract and/or the submission package are not satisfactory, the Commission should communicate the deficiencies to the tribe and the management contractor and provide them with a full opportunity to cure the deficiencies. The Chairwoman should not disapprove a management contract under circumstances where the parties would have been willing to cure the deficiencies if they had fully understood the Commission's concerns.

In any event, these issues concerning deficient management contracts or submission packages are unrelated to the trustee standard for disapproving a management contract. However, if the Chairwoman intends to invoke the trustee standard in the future as a basis for disapproving management contracts, the Commission should give consideration to clarifying the factors which will be taken into account with respect to invoking the trustee standard in order to give notice and guidance to tribes and their actual and prospective management contractors regarding how the trustee standard will be applied.

PART 537 – BACKGROUND INVESTIGATIONS FOR PERSONS OR ENTITIES WITH A FINANCIAL INTEREST IN, OR HAVING MANAGEMENT RESPONSIBILITY FOR, A MANAGEMENT CONTRACT

Should this part be revised to clarify whether the contractor should be required to submit the Class II background information when the contract is only for Class III gaming?

The Notice of Inquiry suggests that there is confusion as to whether a management contractor should be required to submit the Class II background information when the management contract is only for Class III gaming. In multiple instances, the IGRA and the regulations establish a clear distinction between the authority of the Commission with respect to the oversight of Class II gaming operations versus Class III gaming operations. The Commission recognized this distinction when it issued the Part 537 background investigation regulations in 1993. The Commission needs to carefully consider its position regarding its legal authority concerning background investigations for management contracts governing Class III gaming. Upon review of those issues, the Commission should then consider clarifying its regulations accordingly.

If the Part 537 regulations are clarified, consideration should also be given as to whether there should be thresholds which exclude institutional investors or persons or entities with de minimis financial interests in the management contractor from some or all of the background investigation requirements, similar to the institutional investor or de minimus interest exclusions established by other federal and state regulatory authorities.

PARTS 519, 524, 539 & 577 – PROCEEDINGS BEFORE THE COMMISSION

Should the Commission consider more comprehensive and detailed procedural rules?

The less detailed procedures for appeals to the Commission of decisions by the Chairwoman to approve or disapprove tribal gaming ordinances and management contracts set forth in Parts 524 and 539, respectively, should be deleted, and all appeals to the Commission of decisions by the Chairwoman should be governed by the more detailed appeals procedures set forth in Section 577.

The appeals procedures in 577 should be updated to provide a more comprehensive set of procedural rules, including clarification of rules relating to the following: computation of time; participation in appeals proceedings as a matter of right; rights to intervene, or oppose the intervention, of parties in the appeals proceedings; the records available in appeals proceedings; and the role of Commission staff and attorneys in appeals proceedings.

PART 543 – CLASS II MINIMUM INTERNAL CONTROL STANDARDS (MICS)

The Commission should make the development of a complete Class II MICS package a priority. As The Commission is aware, the development of the Class II MICS, under the prior administration, involved a multi-phase process. The first stage of the process addressed only the development of bingo standards (Section 543.7). The Tribe actively participated in this process, both through a representative on the MICS Tribal Advisory Committee (MTAC) and its attorney, who was part of the general public that attended the many meetings and telephone conferences dedicated to the drafting of Section 543.7. In the Tribe's view, this process, although time consuming, was very productive and resulted in a product that, for the most part, accurately reflects appropriate minimum internal control standards in a Class II gaming environment.

Unfortunately, the second stage of this process (although similar to the first in that an MTAC formed and meetings were held between the MTAC and the Commission) was far less productive and resulted in what we believe is a seriously flawed and potentially damaging product. The Tribe's representative attended all of the meetings and believes that the process was ineffectual and inappropriate for the following reasons:

1. Unlike the first stage, tribal representatives who were not part of the MTAC were unable to participate in any meaningful way due to the Commission's strict rules.[1]

2. Although these meetings were touted by the Commission as being a review of both Class III and Class II MICS, this was not the case. In reality, the Commission only reviewed and revised the Class III MICS and then cut and pasted the changes into the Class II MICS.

3. The vast majority of the MTAC members were Class III gaming regulators who had little, if any, experience in, or knowledge of, Class II gaming.

As a result of the foregoing process issues, the Class II MICS in their current form are fatally flawed.[2] Thus, the Tribe strongly encourages the Commission to abandon the "cut and paste" regulations that were developed through what was, in reality, a Class III MICS review process and undertake a process specifically devoted to the development of Class II MICS.

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[1] Tribal representatives who attended these meetings, but were not part of the MTAC, where permitted to speak only during the last hour of each day. Being denied the opportunity to address the MTAC or the Commission during any actual debate over specific substantive issues and being limited to only an hour when there were at least fifteen tribal representatives in attendance, made it nearly impossible for the tribal representative to provide any substantive input. While the Tribe recognizes the need for some sort of organizational controls to ensure each meeting is productive, the Tribe believes that the Commission's chosen method was inappropriate and disrespectful to one of the most elemental tenants of the government-to-government relationship.

[2] Examples of some of the most notable flaws were provided in the Tribe's response to the Commission's 2010 request for comments on Minimum Internal Control Standards.

The Tribe is uniquely interested in ensuring the development of Class II MICS that are appropriate for, and specific to, a Class II gaming environment as such MICS will have a significant effect on the Tribe. As the Commission is likely aware, the Tribe's gaming operations are not merely supplemented by Class II gaming, but are, in fact, entirely dependent on Class II gaming. As a result, any proposed regulations present the Tribe with a markedly different and more serious concern than that of most other Tribes. Thus, the Tribe believes that proper consultation dictates that Commission actively involve the Tribe in the rulemaking process.

The Tribe believes that either a negotiated rulemaking or a Tribal Advisory Committee process would be appropriate. However, if the Commission should elect to use a Tribal Advisory Committee, the Commission must ensure that such Committee is appropriately comprised of individuals who (i) have adequate experience in, or knowledge of, Class II gaming; (ii) adequately represent the tribes that are most impacted by the Class II MICS; and (iii) are able to fully commit the necessary attention and time to the process.

PART 547 – CLASS II MINIMUM TECHNICAL STANDARDS

Like the bingo portion of the Class II MICS, the Class II Minimum Technical Standards (Technical Standards) were developed through an extensive process using a Tribal Advisory Committee with assistance from technical and other experts. While the Tribe believes this process was useful and resulted in a good initial product, the practical application of the Technical Standards has revealed some issues. As the Commission is aware, the Technical Standards may have a direct and potentially substantial impact on Class II gaming. Thus, the Tribe believes the Commission should make a review of these regulations a priority.

The Tribe believes that either a negotiated rulemaking or a Tribal Advisory Committee process would be appropriate. However, if the Commission should elect to use a Tribal Advisory Committee, the Commission must ensure that such Committee is appropriately comprised of individuals who (i) either have the technical experience necessary to develop appropriate standards or are permitted to be accompanied and assisted by such experts; (ii) adequately represent the tribes that are most impacted by the Technical Standards; and (iii) are able to fully commit the necessary attention and time to the process.

PART 556 – BACKGROUND INVESTIGATIONS FOR LICENSING

Should the pilot program for submission and processing of fingerprints through the Commission be formalized with regulations?

The pilot program has been a success and should be formalized.

PART 559 – FACILITY LICENSE NOTIFICATIONS, RENEWALS AND SUBMISSIONS

Should this part be revised?

Part 559 presents many issues for tribes, like Lytton, who utilize other regulated entities to provide services at the facility. Thus, the Commission should undertake a comprehensive review, including

consulting with tribes, to ensure that these regulations are not too onerous for such tribes. As part of the review process, the Commission should consider issuing bulletins, where possible, to cover best practices rather than making such a regulatory requirement.

PROPOSED NEW REGULATIONS

Fingerprinting for Non-Primary Management Officials or Key Employees.

Should the fingerprinting process be expanded to include vendors, consultants, and other non-employees that have access to the gaming operations?

Expanding the fingerprinting process to include vendors, consultants, and other non-employees cannot be mandated by the Commission. However, providing a voluntary process requesting such fingerprinting may be beneficial to tribes. The Commission should work closely with tribes to develop a process that will ensure compliance with FBI requirements as well as Commission and tribal regulations.

Tribal Advisory Committee

Should a regulation be adopted or a policy statement be made?

Developing a policy statement outlining the formation, purpose, scope, and rules relating to Tribal Advisory Committees (TAC) would be beneficial to both the Commission and tribes. In the past, there has been confusion and uncertainty surrounding the use of TACs, particularly regarding the rules governing TAC meetings. This confusion and uncertainty has led to tension between the Commission and the tribal community, which in turn, has disrupted the more important substantive discussions. A clear and detailed policy statement that can be applied across the board could help to prevent such issues in the future.

Sole Proprietary Interest Regulation

The Tribe has general concerns regarding the Commission's interpretation and application of the sole proprietary interest requirement which is set forth in the tribal gaming ordinance provisions of the IGRA and the regulations. The body of Commission determinations regarding the sole proprietary interest requirement which is in the public domain is internally inconsistent and does not provide clear guidance to tribes and contractors regarding which contracts would or would not violate the requirement. The resulting confusion and uncertainty has made it more difficult for tribe to attract suitable business partners to Indian country. The Tribe considers the status quo regarding the sole proprietary interest requirement to be unhelpful to Indian country generally and encourages the Commission to review this topic carefully.

CONCLUSION

The Tribe appreciates the opportunity to submit these comments. The Tribe looks forward to future discussions and/or consultations with representatives of Commission regarding the review of the Commission's regulations

Sincerely,

Kathryn A Ogas

Kathryn A. Ogas
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